United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-1072
76-2015

United States Court of Appeals
For the Second Circuit

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P/S

THE UNITED STATES,

vs.

JOHN CAPRA, a/k/a "Hooks", et al.,
Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of New York

Appellant's Brief

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QUESTION PRESENTED

Whether defendants' specific evidence demonstrating taint of the main Government witness requires a hearing to determine whether a new trial shall be granted or the indictment dismissed?

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

- against -

JOHN CAPRA, LEOLUCA GUARINO and STEPHEN DELLACAVA,

Defendants-Appellants.

JOHN CAPRA, LEOLUCA GUARINO and STEPHEN DELLACAVA,

Petitioners-Appellants,

- against -

UNITED STATES OF AMERICA,

Respondent.

PRELIMINARY STATEMENT

This is an appeal from an order of the District Court (Frankel,J.) dated January 20, 1976, denying and dismissing respectively defendants motion and petition for dismissal of an indictment, a new trial or a hearing with respect thereto. (A115-20) [1].

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1. Numerical references preceded by "A" are to the Appendix on Appeal filed with this appeal. Numerical references without letter prefix are to the original transcript of trial and pre-trial proceedings in the District Court.

In April of 1973, Capra, Guarino, Dellacava and others were charged in a five count indictment with violations of the narcotics laws. Count 1 alleged a conspiracy to violate the narcotics laws in violation of 26 U.S.C. Section 7237(b) and 21 U.S.C. Section 846. Counts 2 and 3 charged the sale of two kilograms of heroin in August of 1970 and one kilogram of heroin on November 6, 1970, respectively, in violation of 26 U.S.C. Section 4705(a) and Section 7237(b). Count 4 charged distribution and possession with intent to distribute 5-1/2 kilograms of heroin in October of 1971 in violation of 21 U.S.C. Sections 812, 841(a)(1) and 841(b)(1)(A); and Count 5 charged the same offense on the date with regard to one kilogram of cocaine. Joaquin Ramos, an unindicted co-conspirator, testified against Capra, Guarino and Dellacava as to their roles in the conspiracy from 1969 to November, 1971 and as to their complicity in the crimes charged in Counts 2, 3, 4 and 5. Ramos had been convicted in September, 1972 of possession in Toledo, Ohio of the narcotics alleged in Counts 4 and 5 of the indictment. Ramos was the only witness at the trial connecting Capra, Guarino and Dellacava to the crimes charged in the substantive counts. [2] (A44-5)

The Government introduced at the trial several transcripts and recordings of wiretaps[3] involving Capra,

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2. The other witnesses who testified at the trial related to the conspiracy charge or the complicity of the other defendants in the substantive counts.

3. These wiretaps were referred to as the "Diane's Bar" taps.

Guarino and Dellacava in order to corroborate Ramos' testimony that this was an on-going conspiracy involving all of the defendants and further offered the testimony of officers and agents who conducted surveillances of the defendants on the basis of leads provided by the wiretapping. After a trial by jury, Capra, Guarino and Dellacava were found guilty as charged and a judgment of conviction was entered on each of the verdicts. This Court in United States v. Capra, et al., 501 F2d 267, reversed their judgments of conviction on Count 1 and affirmed their judgments of convictions as to Counts 2, 3, 4 and 5. The reversal of the conspiracy was "mandated by both the illegal wiretapping... and the resulting taint of police surveillance and subsequent wiretaps". United States v. Capra, et al., 501 F2d 276, ftn. 5. These subsequent wiretaps or bugs, authorized as a result of the Diane's Bar taps, were, to wit, an eavesdropping warrant dated March 9, 1972 on the premises of Ray's Staticnery Store; two renewals thereof on April 8, 1972 and May 8, 1972; an eavesdropping warrant dated June 11, 1972 on the premises known as Steve's Air Conditioning and renewals thereof on July 12, 1972, August 15, 1972 and September 15, 1972; an eavesdropping authorization for a bug dated September 18, 1972 at the premises, 1023 Havermeyer Avenue and a renewal thereof on October 18, 1972; an eavesdropping authorization for a bug in an apartment in Whitestone, Queens, dated February 15, 1973 and a renewal thereof on

on March 20, 1973 [4]. (A 45-6).

As a result of the bug authorization dated September 18, 1972 at 1023 Havermeyer Avenue, a conversation between Capra, Guarino and Dellacava was illegally overheard on October 2, 1972 which, according to Detective George Eaton, the monitoring agent, connected

> "Guarino, Capra and Dellacava and others to several kilograms of heroin and cocaine which were seized in Toledo, Ohio in November, 1971.... Dellacava, Capra, the unknown male and Guarino...thereby implicated themselves quite strongly in the possession, transfer and sale of several kilograms of heroin and cocaine and of conspiracy to commit those crimes."
> (Affidavit of George Eaton dated October 18, 1972, A 19-38)

Eaton's conclusion was based upon information told to him by James Nauens, a New York City police officer who had been involved in the arrest of Ramos in November, 1971, who had testified at Ramos' trial in Toledo, which resulted in Ramos' connection and sentence of 20 years in prison, and who had monitored wiretaps at Steve's Air Conditioning during August of 1972. (A 22-23, 39, 40). [5].

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5. The significance of the Steve's Air Conditioning tap, as will be shown infra is that Nauens discovered that a Joseph Messina was connected to Capra, Guarino and Dellacava as a result of monitoring that tap.

STATEMENT

Defendants' motion and petition (A 44-52, 107-8) alleged specific evidence which demonstrated that the testimony of Joaquin Ramos was bargained for and procured by the Government as a result of the illegal interception of defendants conversation of October 2, 1972. [6] That evidence, not available to the defendants at trial, consists of (1) the affidavit of Hipolito Navarro stating that in early December 1972, a time when Ramos had not yet decided to cooperate with the Government, Ramos knew of the interception of the conversation of October 2, 1972 (A 41-2) and (2) the Government's admission in December 1973, after trial and conviction of defendants, that the conversation of October 2, 1972 had been used prior to Ramos cooperating to obtain for him the promise of leniency from the Ohio prosecutors and Courts. (A 53-77).

That evidence together with the trial transcript and the affidavits and logs in connection with the illegal

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6. Although this Court has concluded on direct appeal that Ramos' testimony was untainted by the illegal wiretaps, United States v. Capra, supra at n. , that conclusion rested solely on the trial record which was incomplete since defendants' contentions were neither heard nor decided at trial. Moreover, prior to this Court's conclusion, the issue was not even briefed or argued in this Court.

eavesdropping was relied on by defendants to sustain their burden of demonstrating the taint of Ramos' testimony since the reduction of Ramos' sentence was the quid pro quo for Ramos' testimony and the reduction of that sentence was a direct and immediate result of the Government's use of information gained from defendants as a result of illegal eavesdropping.

In November of 1971, Joaquin Ramos was arrested and charged in Toledo, Ohio with the possession of 5-1/2 kilograms of heroin and one kilogram of cocaine. In September of 1972, after spending 11 months in the Lucas County, Ohio jail, he was tried and convicted of the conspiracy and possession upon the eyewitness testimony of three people who identified him as the person who left the suitcase containing the narcotics at the Toledo railroad terminal. Ramos was sentenced on the same day of his conviction to a 10 to 20 year term in the Ohio Penitentiary. After his "wrongful conviction", Ramos' nerves fell apart and he looked forward, because of his previous narcotics record, to at least ten years in jail before probation (851, 973). During the time he awaited trial in the Toledo jail, agents came to see him and asked him to cooperate five or six times but he refused and told them not to bother coming and seeing him (574, 585). Even after his conviction, BNDD Agent Kostecke visited him but was told by Ramos that he did not wish to cooperate with the Government (700, 702). After the interception of

the October 2 conversation between Capra, Guarino and Dellacava, Ramos was subpoenad by an Eastern District Grand Jury and brought to the Eastern District on October 28, 1972 where he spoke with Assistant United States Attorney Heinemann and officers Jackson and Nauens who knew of the October 2 conversation at that time and had discovered that Joseph Messina was connected to the defendants - all as a result of illegal eavesdropping (A 22-J, 39-40). Ramos continued to refuse, however, and claimed his privilege of self-incrimination when questioned in the Eastern District Grand Jury by Heinemann in November 1972 (466, 598). Sometime in the winter of 1972-1973, Ramos heard tapes and was promised that "if I testify against my suppliers, I would get two years time served and put on probation". Since Ramos was not indicted with defendants the promise of "two years time served" could only relate to his Toledo conviction. Accordingly, before Ramos testified in the Southern District Grand Jury in April 1973 against Capra, Guarino and Dellacava in relation to the substantive Counts 2, 3, 4 and 5, Assistant United States Attorney Feffer made a trip to Toledo to speak to the Ohio Prosecutor, Melvin Resnick (933).

After the conviction of Capra, Guarino and Dellacava, Ramos was brought before the Ohio Court of Common Please by the State Prosecutor, Melvin Resnick. It was disclosed to the Ohio Court that

> "the Office of the United States District Attorney from New York...discovered that John Ramos was not the person who actually brought the narcotics into the City of Toledo, that it was another person by the name of Joseph Messina." (A57)

The Court was further advised by A.U.S.A. Feffer that Ramos:

> "was asked to cooperate against the suppliers and other people who were dealing in narcotics in the New York City area. As expected, he provided us with information primarily on three individuals; John Capra, Leo Guarino and a Steven Dellacava." (Emphasis added.) (A60)

The exact or near-approximate date of Ramos' decision to cooperate was neither elicited at the trial or at the Toledo hearing. We can, however, infer that it was not made before November 1972, since Ramos claimed his Fifth Amendment privilege in the Eastern District Grand Jury proceedings (466, 598). We may also infer that the decision came after A.U.S.A. Feffer returned from his visit with the Ohio State Prosecutor since Ramos' testimony was premised on the reduction of his Toledo sentence (933).

In spite of Ramos' cooperation with the Government the Ohio Court was reluctant to reduce Ramos' 20 year sentence. The Court stated:

> "to grant a motion for a new trial is to fly into the face of the testimony of three people who identified Ramos here and put him here. The hurdle must be overcome.
>
> Mr. Feffer, as an Assistant United States District Attorney, and irregardless of Mr. Ramos' offer and actually helping the Government are you convinced and will you give him your professional word you are convinced, and you had evidence presented in that trial, that evidence convinces you that John Ramos was not the courier who brought contraband into

this jurisdiction." (Emphasis added) A63)

Mr. Feffer replied that:

> "there are several reasons that we have discovered since the trial of Mr. Ramos that convinces our office and other people that Mr. Ramos, while he was fully involved with this transaction was not physically present in Ohio, did not personally deliver that suitcase to the terminal on October 20th." (A64)

Those reasons were based upon the discovery of Joseph Messina and the October 2 conversation:

> "the name Messina came up during the course of the trial here in Ohio. Mr. Sibold testified that he had a conversation with the individual who left the suitcase; this individual wanted flight information to go back to New York City, and he gave the name Messina to Mr. Sibold, for the purpose of reserving a flight.
>
> The taxicab driver, Mrs. Raudebush, testified in both cases, who picked him up at the terminal and drove him to the airport, and was an individual who also identified Mr. Ramos.
>
> When he got to the airport a ticket was purchased, and that ticked was received in evidence in this trial, and the one in New York. And that ticket bore the name J. Messina.
>
> Now an investigation conducted in New York subsequent to the Ohio trial revealed that there was in fact a person named Joseph Messina. And by coincidence this Joseph Messina was an employee in an air conditioning store in New York City that was owned and operated by Steven Dellacava, John Capra and Leo Guarino, the three people that supply Mr. Ramos with his narcotics.
>
> In October of 1972, a bug was planted in a social club in the Bronx, and conversations of Capra, Guarino and Dellacava were intercepted. This was a court ordered bug device.
>
> At that time, conversations were intercepted between these three men, in which they discussed in some detail the delivery of this suitcase to the Toledo railroad terminal, and in which they mentioned the fact that Messina came to Toledo and very stupidly gave his own name at the railroad terminal and on the

flight back to New York City.

They discussed this in some detail, as I said, and they indicated beyond any question that the person who brought the suitcase to Toledo for them was in fact J. Messina.

And finally, I think most important, is what Mr. Resnick has already made reference to, an envelope addressed to Willie Middlebrook, and a note which had on it, go to Penn Central Railroad Terminal, Toledo, Ohio, open during the daytime only, or words to that effect, were found I believe on the person of Alan Morris at the end of October.

THE COURT: At the time he was booked.

MR. FEFFER: At the time he was arrested, that is correct. And Joseph Messina was ordered by the District Court Judge in New York to produce handwriting exemplars. He did so.

And his handwriting was then compared with the handwriting on the envelope to Mr. Willie Middlebrook, and the note inside, the directions to go to the Penn Railroad station.

And there was a positive identification, as testified to by the handwriting analyst at trial in New York, that the individual, Messina, positively wrote the writing on the envelope, and the note.

There was further testimony both at this trial and the trial in New York, by a postal inspector, that that note and envelope was sent from Toledo to Detroit, Michigan on October 20th, 1971, the date in question.

So there can be little question that the individual who wrote that letter, that note, and addressed it to Middlebrook, was the same person who brought the suitcase to this area.

Based on these facts, and on a full debriefing of John Ramos, at which he admitted complicity in narcotics dealings going back to 1952, with this one exception, we are convinced that Joseph Messina was the individual who appeared in Toledo with that suitcase on October 20th, 1971." (A65-7)

The Government's opposition to defendants' applications was based on this Court's decision on appeal that the trial record clearly establishes police awareness of Ramos' connection with movants not only before the interception of October 2, 1972, but well before the initial wiretap at Diane's bar, and further provides no basis for the speculation that his agreement to cooperate was motivated by the interception, rather than by the conclusion of related state proceedings against him, or, indeed, by any other motivation. (A90) Nowhere in the Government's response to defendants' applications is there a denial that Ramos' cooperation was motivated by anything else but the promise of "the conclusion of related state proceedings against him". Neither is it factually denied by the Government that Ramos heard the tapes or of them before he cooperated nor that A.U.S.A. Feffer used the tapes to secure the promise of leniency from the Ohio State Prosecutor.

The District Court denied defendants' applications by concluding that "it seems fantastic that Government agents would have told Ramos the kind of intelligence concerning an ongoing tap that the movants would now discern in the prisoner's affidavit". (A119) Additionally, the District Court concluded that the "concern is not with evidence that incriminated petitioners, or touched them directly at all. The complaint here is that the Government may have learned non-incriminatory facts about another person and used that

incorrect information to encourage that person's assistance in law enforcement". (A119). Whether or not it is "fantastic" to believe the Government would do what defendants allege was never determined by an adversarial hearing and the defendants concern is with evidence which, according to Detective George Eaton, connected "Guarino, Capra and Dellacava and others to several kilograms of heroin and cocaine which were seized in Toledo, Ohio in November, 1971," (A21) and thus touched them directly by giving the Government the means to bargain for and procure testimony from Ramos.

ARGUMENT

DEFENDANTS' APPLICATIONS SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING.

Whether or not Ramos decided to cooperate after listening to or hearing about the October 2, 1972 conversation is a question of fact which cannot be dismissed as 'fantastic" or otherwise without a hearing. Nardone v. United States, 308 U.S. 338 (1939); Alderman v. United States, 349 U.S. 183 (1969); United States v. Huss, 482 F2d 38 (2d Cir. 1973). After this Court decided that the Diane's Bar eavesdropping and resultant taps and surveillance were illegal the defendants came forward, in their applications below, with specific evidence demonstrating taint of the Government's main witness - Ramos. To require defendants to prove on paper, in this Court or in the District Court, what should be proved at a hearing runs directly counter to the teachings of Alderman, supra.

> "The United States concedes that when an illegal search has come to light, it has the ultimate burden of persuasion to show that its evidence is untainted. But at the same time petitioners acknowledge that they must go forward with specific evidence demonstrating taint. '[T]he trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin'. Nardone v. United States, 308 U.S. 338, 341, 60 S.Ct. 266, 268, 84 L.Ed. 307 (1939).

> Adversary proceedings are a major aspect of our system of criminal justice. Their superiority as a means for attaining justice in a given case is nowhere more evident than in those cases, such as the ones at bar, where an issue must be decided on the basis of a large volume of factual materials, and after consideration of the many and subtle interrelationships which may exist among the facts reflected by these records. As the need for adversary inquiry is increased by the complexity of the issues presented for adjudication, and by the consequent inadequacy of ex parte procedures as a means for their accurate resolution, the displacement of well-informed advocacy necessarily becomes less justifiable. Alderman, supra, at 183-4.

Since there has not been a Government denial of the defendant's allegations that Ramos' testimony was bargained for and procured through the use of the illegal interceptions, the defendants are entitled to a full hearing at which the facts may be fully developed. As this Court has observed a showing that the Government:

> "had sufficient independent information available so that in the normal course of events it might have discovered the questioned evidence without an illegal search cannot excuse the illegality or cure tainted matter. The better the Government's case against an individual the freer it would be to invade his privacy. We cannot accept such a result. The test must be one of actualities, not possibilities. "
>
> United States v. Paroutian, 299 F.2d 486, 489 (2nd Cir., 1962).

Moreover, the Government's reliance on this Court's ex parte determination based only on the trial record effectively relieves it of the "ultimate burden of persuasion to show that its evidence is untainted". This Court's instruction in United States v. Huss, supra, at 47, is significant herein.

> "To compel a party who objects to the use of evidence obtained as a result of unlawful wire-tapping to go forward with a showing of taint, Alderman v. United States, supra, 394 U.S. at 183, 89 S.Ct. 961, and then to withhold from him the means or tools to meet that burden, is to create an absurdity in the law."

To conclude that defendants' claim is "fantastic" without granting a hearing to determine its validity is to commit the very absurdity condemned in Huss.

> "Of course, the question is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959). Wong Sun v. United States, 371 U.S. 471, 487-488, 83 S.Ct. 407,417, 9 L.Ed2d 441 (1963). Tane is consistent with that test, as noted in decisions of this Court in United States v. Cole, 463 F2d 163, 171-172 (2d Cir. 1972), and United States v. Friedland, 441 F2d 855, 860 (2d Cir.) cert. denied 404 U.S. 867, 92 S.Ct. 143, 30 L.Ed2d 111 (1971). While these cases quite correctly assert that disclosure of an individual's identity in connection with one criminal act does not, by itself, preclude the government from ever using evidence of an unrelated crime in which he is involved, the rule survives that the government must show that evidence to which objection is made derives from an independent, untainted source and investigation. We can see no escape from the principle that a party raising objections to questions based on illegal electronic

> surveillance must be given a meaningful opportunity to argue that the evidence has been obtained by exploitation of the primary illegality. Huss, supra, at 46-7. (Emphasis added)

This Court has issued the suppression order on the Diane's Bar taps and resultant surveillance as it should have been issued by the District Court prior to trial. United States v. Capra, supra. The defendants, therefore, should not be in a worse position by virtue of the District Court's failure to rule the evidence illegally seized. For if the District Court had properly ruled, a taint hearing would have followed there, and it should follow now especially since defendants have come forward with specific evidence demonstrating taint. Any other course creates another fruit of the illegally seized evidence:

> "it is as much a use of suppressed evidence to base upon it a finding that further examination will be idle, as it is to base upon it a finding that intercepted talks have not 'led' to evidence introduced at the trial. United States v. Coplon, 185 F.2d 629, 640 (2nd Cir., 1950).

For these reasons, and because appellate courts cannot and should not resolve issues of fact ex parte, the Supreme Court has held that, despite its own opinions as to the effects on the changed weight of the evidence of the ultimate fact, the District Court must first pass on the altered state of the evidence after a full hearing. United States v. Matlock, 94 S.Ct. 988 (1974); Kolod v. United States, 390 U.S. 136, 137 (1968); Nardone v. United States, supra, Alderman v. United States, supra. This case is another appellate instance of changed rulings on admissibility and,

as dictated by the above decisions, the District Court in this case must hold a full hearing in the altered state of affairs.

> "The teaching of the Supreme Court in Alderman v. United States, supra, cannot be avoided. We are instructed that when illegal electronic surveillance has come to light it is the adversary system, not representations by the government and not in camera decisions by the court, which must be relied upon to determine whether overheard matter is 'relevant' to the taint hearing." United States v. Huss, supra at 50.

It is the defendants' allegation that the chief prosecution witness' testimony resulted from the calculated exploitation of governmental illegalities. Prior to illegal electronic surveillance, Joaquin Ramos was an uncooperative trafficker facing a substantial term in an Ohio State Penitentiary. Government investigators were unaware of Ramos' association with the defendants in connection with the narcotics which formed the basis of Counts 4 and 5 of the indictment. The Government had never realized his evidentiary significance in a possible prosecution of defendants until the illegal eavesdropping.

The illicit surveillance intercepted a conversation between defendants which exculpated Ramos as to an Ohio narcotics offense. The record of the Ohio state proceeding, where federal prosecutors intervened to present exculpatory material relating to Ramos' conviction, establishes both the casual connection between the initial illegal surveillance and the government's discovery and also illustrates the

Government's reliance on the tapes to convert Ramos into a Government witness.

Speaking for the State of Ohio, Mr. Melvin Resnick acknowledged:

> "That there was newly discovered evidence and that evidence came to their knowledge through our office, and the office of the United States Attorney from New York, wherein it was discovered that John Ramos (Joaquin) was not the person who actually brought the narcotics into the City of Toledo, that it was another person by the name of Joseph Messina,...there was some other evidence through other persons who were directly involved in the narcotics business in New York and responsible for the shipment here in Toledo, certain conversations by them which indicated that it was in fact Joseph Messina and not John Ramos who brought the heroin here." (A58)

Speaking for the office of the United States Attorney, the Southern District of New York, Mr. Gerald Feffer stated that:

> "In October of 1972, a bug was planted in a social club in the Bronx, and conversations of Capra, Guarino and Della Cava were intercepted. This was a court order bug device. At that time conversations were intercepted between these three men, in which they discussed in some detail the delivery of this suitcase to the Toledo railroad terminal, and in which they mentioned the fact that Messina came to Toledo and very stupidly gave his own name at the railroad terminal and on the flight back to New York City. They discussed this in some detail, as I said, and they indicated beyond any question that the person who brought this suitcase to Toledo for them was in fact J. Messina." (A66).

The discovery of Ramos' evidentiary meaning and his acquisition as a witness was not a fortuitous occurrence nor did it occur through an independent source but was derived from the aforementioned wiretaps. The casual nexus between the illegal wires and discovery of the witness runs straight

and true. Moreover, the connection between J. Messina and the defendants was discovered as a direct result of another illegal interception by Detective Nauens.

The discovery of Ramos' suppliers had obvious prosecutorial significance. The illegal interception provided the Government with a known source to corroborate a conspiratorial narcotics web and anticipate his future testimonial relevance. The Government also illegally acquired information which was used to induce his testimony. The tapes were the instrument by which Ramos' testimony was bargained for and procured. The unlawful investigative procedures lead directly and intentionally to his testimony.

The operative fact which induced his testimony was the illegally intercepted communication exculpating Ramos. There was not even attenuation on the grounds of voluntary disclosure. The affidavit of Hipolito Navarro who spoke with Ramos, attests to the exploitive link, the use of the illegal information to compel the witness' cooperation and the state of the witness' mind regarding his testimony.

> "That the affiant (Hipolito Navarro) spoke to Mr. Ramos expressing his curiosity for the latter being there and wanting to know if it was true that he (Ramos) was under a 20 year sentence. Upon recognizing the affiant Mr. Ramos conceded that it was indeed true that he was given a 20 year sentence in Ohio; however, he added that he was confident that he would beat the 20 years because of newly discovered evidence. That the affiant became curious as to the nature of the newly discovered evidence but Mr. Ramos would not discuss is any further other than to say that he had recently become aware of the existence of tapes mentioning his name as well as others, and that said tapes would guarantee him a new trial and complete vindication.

> That Mr. Ramos also indicated to the affiant in further conversation, that the tapes were responsible for his being at West Street and that because of them he had been subpoenad to the Grand Jury in the Eastern District of New York" (emphasis added). (A42).

Ramos' trial testimony corroborates this for Ramos did not testify against defendants until Mr. Feffer took a trip to Ohio to speak to the Ohio prosecutor, Mr. Resnick.

Harrison v. United States, 392 U.S. 226 (1965) and United States v. Schipani, 289 S.Supp. 43 (1966), criticize the reliance on the voluntariness of tainted testimony. The material issue is not whether the witness made a knowing decision but why.

Deterent considerations are the primary focus of the poisonous tree doctrine. Regardless of Ramos' decision to testify, it cannot be controverted that Ramos' testimony was gained as a direct exploitation of illicit electronic surveillance. The inducement nexus has been amply demonstrated. The Ohio state transcript rebuts any contention of independent source and documents the exploitative source of the testimony. The witness never indicated a pre-disposition to testify until the illegal interceptions were either brought to his attention or used to help him.

In Williams v. United States, 382 F.2d 48 (5th Cir., 1967), the Court suppressed the testimony of a witness whose relationship to the defendant was disclosed as a product of an illegal search. The Court analyzed the taint problem as follows:

"A short account of the facts leading up to the indictment is necessary for a determination of the nexus between the illegal serach and Mrs. Thomas' testimony. The illegal search which uncovered the checkbook took place on February 1, 1963. The surveillance which ended in the search was carried on because Williams was under a general suspicion for theft of government checks. From the testimony of the officers it is clear that he was not under suspicion for the theft of Milligan's check. Further, the testimony indicates that it was not until after the book of checks was discovered that the postal inspectors went to Mrs. Thomas for the purpose of having her attempt to identify Williams. Thus, it appears that but for the discovery of the checkbook during the illegal search, Mrs. Thomas would not have identified Williams.

The real significance, however, lies not in what or would not have happened but for the checkbook, but what actually did happen. It is clear that the checkbook linked Williams to a stolen check payable to Murphy Millgan and cashed by Mrs. Thomas. It was not until after the checkbook was discovered in Williams' car that he was under suspicion for the offense charged in the indictment. More significantly, Mrs. Thomas did not identify Williams until the postal authorities came to her, over two years after the check was cashed, with a series of pictures, one of which was of Williams, from which a positive identification was made. Thus, it is apparent that the identification of Williams by Mrs. Thomas was an indirect product of the illegal serach and not a product of the independent activity of the postal inspectors. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed2d 441 (1963); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182 (1920). As such, Mrs. Thomas' testimony linking Williams to the offense charged is inadmissible." Id. at 51.

The facts in the instant case are on all fours with Williams. The surveillance which ended in the illegal conversation, was carried on because the defendants were under a general suspicion for narcotics offenses. It is clear that they were not under suspicion for the Toledo narcotics. Further, it was not until after the illegal conversation of October 2 was overheard that Ramos was summoned to the Grand

Jury in the Eastern District for the purpose of having him identify his suppliers, whom the Government expected, because of the illegal interception, to be Capra, Guarino and Dellacava. Thus, as in Williams, it appears that but for the discovery of the illegal conversation, the defendants would not have been identified by Ramos. As in Williams, the real significance lies not in what would or would not have happened but for the interception of the illegal conversation, but what actually did happen. It is clear that the conversation of October 2 linked Capra, Guarino and Dellacava to the delivery of the Toledo drugs, a crime for which Ramos had been convicted. It was not until after the conversation was illegally discovered that Capra, Guarino and Dellacava were under suspicion for the substantive offenses charged in the indictment. More significantly, Ramos did not identify the defendants as his suppliers until summoned to the Southern District Grand Jury, over a year after the crime was committed and he only did so after Mr. Feffer went to Toledo and spoke to Mr. Resnick concerning the vacatur of the Toledo conviction. Thus it is apparent in this case as it was in Williams that the testimony of Ramos was a product of the illegal search and not a product of the independent activity of the Government.

> "A lengthy discussion of the cases dealing in this area is not necessary because the significance of the nexus between an illegal search and challenged evidence is one of common sense, see Nardone v. United States, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1939), to be considered under the facts and circumstances of the particular case. Suffice it to say that the road from

> the illegal search (wiretap) to the testimony of Mrs. Thomas (Ramos), although a little long, was not a winding one. United States v. Tane, 329 F.2d 848 (2d Cir. 1964) Ibid.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (82 Stat. 211, as amended, 18 U.S.C. Section 2510-2520) recognizes the pernicious effects of illegal electronic surveillance on the structure of Government and its infringement on civil liberties. Title III prohibits not only the disclosure or use of information obtained through electronic surveillance but also bars the use as evidence of the contents of fruits of illegal interceptions and the use of derivative information and leads obtained through such interceptions. (Refer to 18 U.S.C. Section 2511(1), 2515, 2550.) Congress recognized that the exclusionary rule:

> "...is intended to protect the privacy of the communication itself...S. Rep. No. 1097, 90th Cong. 2d Sess., 90 (1968) U.S. Code Cong. and Admin. News p. 2178. As defined in Title III 'contents' when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communications or the existence, substance, purport or meaning of that communication. 18 U.S.C. Section 2510(8). The definition thus includes all aspects of the communication itself. No aspect, including the identity of the parties, the substance of the communications between them, or the fact of the communication is excluded. The privacy of the communication to be protected, as intended to be comprehensive." S. Rep. No. 1097, supra, at 91, U.S. Code Cong. and Admin. News, page 2179.

The use of illegal electronic surveillance constitutes a maximum invasion of privacy and consequently merits maximum deterence. The admission of this secondary evidence will significantly encourage police misconduct in the future. The acts of the agents in the purposeful exploitation of the initial illegality represents an attempt to circumvent the

the dictates of the exclusionary rule. As stated in United States v. Gelbard, 92 S.Ct. 23 (1973):

> "The perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings... by exlcluding such evidence and not to entangle the courts in illegal acts of Government agents."

To grant a hearing to defendants so that the exploitative nature of the Government's actions can be uncovered is only to do substantial justice in a case where the Government already has been found culpable of using illegal means to obtain a conviction. United States v. Capra, supra. Denial of a hearing can only encourage the unlawful use of evidence by a Government whose duty it is "to safeguard individual liberties if it is to continue to serve the poeple well". United States v. Huss, supra at 52.

CONCLUSION

FOR THE ABOVE STATED REASONS THE ORDER SHOULD BE REVERSED.

Respectfully submitted,

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AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 5 day of April , 19 76 at No. 1 St. Andrews Pl., NYC deponent served the within Brief upon the Appellee U.S. Atty. So. Dist. of NY herein, by delivering a true copy thereof to h im personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me,
this 5 day of April 19 76

Edward Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1973